

KAREN P. HEWITT
United States Attorney
THOMAS STAHL
Assistant U.S. Attorney
California State Bar No. 078291
United States Attorney's Office
Federal Office Building
880 Front Street, Room 6293
San Diego, CA 92101-8893
Email: thomas.stahl@usdoj.gov
Telephone: (619) 557-7140
Facsimile: (619) 557-5004

RONALD J. TENPAS
Assistant Attorney General
JEAN WILLIAMS, Chief
LISA RUSSELL, Assistant Chief
MEREDITH L. FLAX, Trial Attorney, Pro Hac Vice (D.C. Bar 468016)
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
Telephone: (202) 305-0404
Facsimile: (202) 305-0275

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY

Plaintiff,

vs.

KEMPTHORNE, et al.,

Defendants.

Case No. 07-2380-JM-AJB

FEDERAL DEFENDANTS'
ANSWER TO PLAINTIFF'S
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

1 The United States Fish and Wildlife Service (“Service”) and Secretary Dirk Kempthorne,
2 in his official capacity as Secretary of the United States Department of the Interior (collectively
3 “Defendants”), by and through counsel, hereby answer Plaintiff’s Complaint by responding to
4 the corresponding numbered paragraphs of the Complaint as follows:
5

6 1. The allegations in the first and seventh sentences of paragraph 1 are legal conclusions
7 which require no response. To the extent a response is required, Defendants deny the allegations
8 in the first and seventh sentences of paragraph 1. The remaining allegations in paragraph 1
9 characterize the Federal Register notices at 59 Fed. Reg. 64,859 (December 16, 1994), 65 Fed.
10 Reg. 36,512 (June 8, 2000), 66 Fed. Reg. 9,414 (February 7, 2001), 69 Fed. Reg. 23,254 (April
11 28, 2004), and 70 Fed. Reg. 19,562 (April 13, 2005), which speak for themselves and provide the
12 best evidence of their contents and meaning. Any allegations contrary to the notices’ plain
13 language and meaning are denied.
14

15 2. The allegations in paragraph 2 characterize a July 20, 2007 Service press release and
16 November 23, 2007 letter to Representative Rahall, which speak for themselves and provide the
17 best evidence of their contents and meaning. Any allegations contrary to the press release’s and
18 letter’s plain language and meaning are denied.
19

20 3. The allegations in paragraph 3 are legal conclusions which require no response. To the
21 extent a response is required, Defendants deny the allegations in paragraph 3.

22 4. The allegations in paragraph 4 are legal conclusions which require no response. To the
23 extent a response is required, Defendants deny the allegations in paragraph 4.

24 5. In response to the allegations in the first sentence of paragraph 5, Defendants admit that
25 Plaintiff sent a letter dated August 28, 2007, addressed to Secretary Kempthorne and Director
26 Dale Hall, purporting to give notice of a lawsuit. Defendants admit the allegations in the second
27 sentence of paragraph 5. The allegations in the third sentence of paragraph 5 are legal
28

1 conclusions which require no response. To the extent a response is required, Defendants deny
2 the allegations in the third sentence of paragraph 5.

3 6. Defendants lack information or knowledge sufficient to form an opinion as to the truth of
4 the allegations in the first through sixth and eighth sentences of paragraph 6, and on that basis
5 deny the same. The allegations in the seventh sentence of paragraph 6 are legal conclusions
6 which require no response. To the extent a response is required, Defendants deny the allegations
7 in the seventh sentence of paragraph 6.

8
9 7. The allegations in paragraph 7 are legal conclusions which require no response. To the
10 extent a response is required, Defendants deny the allegations in paragraph 7.

11
12 8. Defendants admit the allegations in the first sentence of paragraph 8. In response to the
13 allegations in the second sentence of paragraph 8, Defendants admit that the Secretary of the
14 Department of the Interior (“Secretary”) is authorized and required by federal law to protect and
15 manage the fish, wildlife, and native plant resources of the United States that fall within his
16 statutory jurisdiction, and that administration of portions of the Endangered Species Act
17 (“ESA”), including the designation of critical habitat pursuant to section 4 of the ESA, are some
18 of his statutory responsibilities. The allegations in the third sentence of paragraph 8 characterize
19 Plaintiff’s Complaint and require no response.
20

21 9. Defendants admit the allegations in the first sentence of paragraph 9. In response to the
22 allegations in the second sentence of paragraph 9, Defendants admit that the Service has been
23 delegated authority from the Secretary to administer and implement portions of the ESA,
24 including the designation and revision of critical habitat pursuant to section 4 of the ESA, with
25 regard to the fish, wildlife, and native plant resources of the United States that fall within its
26 statutory jurisdiction.
27

28 10. Defendants admit the allegations in the first sentence of paragraph 10, but aver that the

1 arroyo toad also occurs in Baja California. The remaining allegations in paragraph 10
2 characterize the Federal Register notices at 59 Fed. Reg. 64,859 (December 16, 1994), 66 Fed.
3 Reg. 9,414 (February 7, 2001) and 69 Fed. Reg. 23,254 (April 28, 2004), which speak for
4 themselves and provide the best evidence of their contents and meaning. Any allegations
5 contrary to the notices' plain language and meaning are denied.
6

7 11. The allegations in the first through ninth sentences of paragraph 11 characterize the ESA,
8 which speaks for itself and provides the best evidence of its contents and meaning. Any
9 allegations contrary to the statute's plain language and meaning are denied. In response to the
10 allegations in the tenth sentence of paragraph 11, Defendants admit that the Secretary has
11 delegated some authority to the Service to administer and implement portions of the ESA with
12 regard to the fish, wildlife, and native plant resources of the United States that fall within its
13 statutory jurisdiction.
14

15 12. Defendants admit the allegations in the first sentence of paragraph 12. The remaining
16 allegations in paragraph 12 characterize the recovery plan for the arroyo toad, which speaks for
17 itself and provides the best evidence of its contents and meaning. Any allegations contrary to the
18 recovery plan's plain language and meaning are denied.
19

20 13. In response to the allegations in the first sentence of paragraph 13, Defendants admit the
21 Service did not designate critical habitat for the arroyo toad at the time it was listed. The
22 remaining allegations in the first sentence of paragraph 13 characterize the ESA, which speaks
23 for itself and provides the best evidence of its contents and meaning. Any allegations contrary to
24 the statute's plain language and meaning are denied. The allegations in the second sentence of
25 paragraph 13 characterize the complaint filed in Southwest Center for Biological Diversity, et al.
26 v. USFWS, et al., Case No. 99-CV-1003 WHA (N.D. Cal.), which speaks for itself and provides
27 the best evidence of its contents and meaning. Any allegations contrary to the complaint's plain
28

1 language and meaning are denied. The allegations in the third sentence of paragraph 13
2 characterize a settlement agreement and the Federal Register notice at 65 Fed. Reg. 36,512 (June
3 8, 2000), which speak for themselves and provide the best evidence of their contents and
4 meaning. Any allegations contrary to the settlement agreement's and notice's plain language
5 and meaning are denied.
6

7 14. The allegations in the first sentence of paragraph 14 characterize the Federal Register
8 notice at 66 Fed. Reg. 9,414 (February 7, 2001), which speaks for itself and provides the best
9 evidence of its contents and meaning. Any allegations contrary to the notice's plain language
10 and meaning are denied. The remaining allegations in paragraph 14 characterize the opinion
11 issued in Building Industry Legal Defense Foundation, et al. v. Norton, 231 F. Supp. 2d 100
12 (D.D.C. 2002), which speaks for itself and provides the best evidence of its contents and
13 meaning. Any allegations contrary to the opinion's plain language and meaning are denied.
14

15 15. The allegations in the first and second sentences of paragraph 15 characterize the Federal
16 Register notice at 69 Fed. Reg. 23,254 (April 28, 2004), which speaks for itself and provides the
17 best evidence of its contents and meaning. Any allegations contrary to the notice's plain
18 language and meaning are denied. The remaining allegations in paragraph 15 characterize the
19 recovery plan for the arroyo toad and the Federal Register notice at 69 Fed. Reg. 23,254 (April
20 28, 2004), which speak for themselves and provide the best evidence of their contents and
21 meaning. Any allegations contrary to the recovery plan's and notice's plain language and
22 meaning are denied.
23

24 16. The allegations in the first sentence of paragraph 16 characterize the Court's June 25,
25 2004 minute order in Building Industry Legal Defense Foundation, et al. v. Norton, 01-2311-
26 JDB (D.D.C.), which speaks for itself and provides the best evidence of its contents and
27 meaning. Any allegations contrary to the order's plain language and meaning are denied. The
28

1 remaining allegations in paragraph 16 characterize the Federal Register notice at 70 Fed. Reg.
2 7,459 (February 14, 2005), which speaks for itself and provides the best evidence of its contents
3 and meaning. Any allegations contrary to the notice's plain language and meaning are denied.

4 17. The allegations in paragraph 17 characterize the Federal Register notice at 70 Fed. Reg.
5 19,562 (April 13, 2005), which speaks for itself and provides the best evidence of its contents
6 and meaning. Any allegations contrary to the notice's plain language and meaning are denied.

7 18. The allegations in paragraph 18 characterize the Federal Register notice at 70 Fed. Reg.
8 19,562 (April 13, 2005), which speaks for itself and provides the best evidence of its contents
9 and meaning. Any allegations contrary to the notice's plain language and meaning are denied.

10 19. The allegations in the first through third sentences of paragraph 19 characterize the
11 Federal Register notice at 70 Fed. Reg. 19,562 (April 13, 2005), which speaks for itself and
12 provides the best evidence of its contents and meaning. Any allegations contrary to the notice's
13 plain language and meaning are denied. The allegations in the fourth sentence of paragraph 19
14 characterize the ESA, which speaks for itself and provides the best evidence of its contents and
15 meaning. Any allegations contrary to the statute's plain language and meaning are denied. The
16 allegations in the fifth sentence of paragraph 19 are legal conclusions which require no response.
17 To the extent a response is required, Defendants deny the allegations in the fifth sentence of
18 paragraph 19.

19 20. The allegations in the first sentence of paragraph 20 are legal conclusions which require
20 no response. The remaining allegations in paragraph 20 characterize the Federal Register notices
21 at 69 Fed. Reg. 23,254 (April 28, 2004), 70 Fed. Reg. 7,459 (February 14, 2005), and 70 Fed.
22 Reg. 19,562 (April 13, 2005), which speak for themselves and provide the best evidence of their
23 contents and meaning. Any allegations contrary to the notices' plain language and meaning are
24 denied.

1 21. The allegations in the first and fourth sentences of paragraph 21 characterize the Federal
2 Register notices at 70 Fed. Reg. 7,459 (February 14, 2005) and 70 Fed. Reg. 19,562 (April 13,
3 2005), which speak for themselves and provide the best evidence of their contents and meaning.
4 Any allegations contrary to the notices' plain language and meaning are denied. The allegations
5 in the second sentence of paragraph 21 characterize the ESA, which speaks for itself and
6 provides the best evidence of its contents and meaning. Any allegations contrary to the statute's
7 plain language and meaning are denied. The allegations in the third sentence of paragraph 21
8 characterize the Administrative Procedure Act, which speaks for itself and provides the best
9 evidence of its contents and meaning. Any allegations contrary to the statute's plain language
10 and meaning are denied. The allegations in the fifth sentence of paragraph 21 relating to the
11 Federal Register notices at 70 Fed. Reg. 7,459 (February 14, 2005) and 70 Fed. Reg. 19,562
12 (April 13, 2005) characterize those notices, which speak for themselves and provide the best
13 evidence of their contents and meaning. Any allegations contrary to the notices' plain language
14 and meaning are denied. The remaining allegations in the fifth sentence of paragraph 21 are
15 legal conclusions which require no response. To the extent a response is required, Defendants
16 deny the remaining allegations in the fifth sentence of paragraph 21.

17 22. The allegations in paragraph 22 are legal conclusions which require no response. To the
18 extent a response is required, Defendants deny the allegations in paragraph 22.

19 23. The allegations in paragraph 23 are legal conclusions which require no response. To the
20 extent a response is required, Defendants deny the allegations in paragraph 23.

21 24. The allegations in the first sentence of paragraph 24 characterize the ESA, which speaks
22 for itself and provides the best evidence of its contents and meaning. Any allegations contrary to
23 the statute's plain language and meaning are denied. The allegations in the second sentence of
24 paragraph 24 are legal conclusions which require no response. To the extent a response is

1 required, Defendants deny the allegations in the second sentence of paragraph 24.

2 25. Defendants deny the allegations in the first sentence of paragraph 25. The allegations in
3 the second sentence of paragraph 25 characterize the opinion issued in Gifford Pinchot Task
4 Force v. U.S. Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004), which speaks for itself
5 and provides the best evidence of its contents and meaning. Any allegations contrary to the
6 opinion's plain language and meaning are denied. In response to the allegations in the third
7 sentence of paragraph 25, Defendants admit the Service has not formally revised the regulatory
8 definition of "adverse modification." The allegations in the fourth sentence of paragraph 25
9 characterize the Federal Register notice at 70 Fed. Reg. 19,562 (April 13, 2005), which speaks
10 for itself and provides the best evidence of its contents and meaning. Any allegations contrary to
11 the notice's plain language and meaning are denied. The allegations in the fifth sentence of
12 paragraph 25 relating to the Federal Register notice at 70 Fed. Reg. 19,562 (April 13, 2005)
13 characterize that notice, which speaks for itself and provides the best evidence of its contents and
14 meaning. Any allegations contrary to the notice's plain language and meaning are denied. The
15 remaining allegations in the fifth and sixth sentences of paragraph 25 are legal conclusions
16 which require no response.

17 26. The allegations in paragraph 26 characterize the Federal Register notice at 70 Fed. Reg.
18 19,562 (April 13, 2005) and its associated economic analysis, which speak for themselves and
19 provide the best evidence of their contents and meaning. Any allegations contrary to the notice's
20 and economic analysis' plain language and meaning are denied.

21 27. The allegations in paragraph 27 characterize the Federal Register notice at 70 Fed. Reg.
22 19,562 (April 13, 2005) and its associated economic analysis, which speak for themselves and
23 provide the best evidence of their contents and meaning. Any allegations contrary to the notice's
24 and economic analysis' plain language and meaning are denied.

1 28. The allegations in the first and fifth sentences of paragraph 28 are legal conclusions
2 which require no response. The allegations in the second and third sentences of paragraph 28
3 characterize the Federal Register notice at 70 Fed. Reg. 19,562 (April 13, 2005) and its
4 associated economic analysis, which speak for themselves and provide the best evidence of their
5 contents and meaning. Any allegations contrary to the notice's and economic analysis' plain
6 language and meaning are denied. The allegations in the fourth sentence of paragraph 28
7 characterize the Federal Register notice at 69 Fed. Reg. 23,254 (April 28, 2004), which speaks
8 for itself and provides the best evidence of its contents and meaning. Any allegations contrary to
9 the notice's plain language and meaning are denied.
10

11 29. The allegations in the first sentence of paragraph 29 characterize a November 23, 2007
12 letter to Representative Rahall, which speaks for itself and provides the best evidence of its
13 contents and meaning. Any allegations contrary to the letter's plain language and meaning are
14 denied. The allegations in the second sentence of paragraph 29 are legal conclusions which
15 require no response. To the extent a response is required, Defendants deny the allegations in the
16 second sentence of paragraph 29.
17

18 30. Defendants' responses to the allegations in paragraphs 1 through 29 are incorporated
19 herein by reference.
20

21 31. The allegations in the first and third sentences of paragraph 31 are legal conclusions
22 which require no response. To the extent a response is required, Defendants deny the allegations
23 in the first and third sentences of paragraph 31. The allegations in the second sentence of
24 paragraph 31 relating to the Federal Register notice at 70 Fed. Reg. 19,562 (April 13, 2005)
25 characterize that notice, which speaks for itself and provides the best evidence of its contents and
26 meaning. Any allegations contrary to the notice's plain language and meaning are denied. The
27 remaining allegations in the second sentence of paragraph 31 are legal conclusions which require
28

1 no response. To the extent a response is required, Defendants deny the allegations in the first
2 and third sentences of paragraph 31.

3 32. The allegations in the first, third and fourth sentences of paragraph 32 are legal
4 conclusions which require no response. To the extent a response is required, Defendants deny
5 the allegations in the first, third and fourth sentences of paragraph 32. The allegations in the
6 second sentence of paragraph 32 characterize the Federal Register notices at 69 Fed. Reg. 23,254
7 (April 28, 2004) and 70 Fed. Reg. 19,562 (April 13, 2005), which speak for themselves and
8 provide the best evidence of their contents and meaning. Any allegations contrary to the notices'
9 plain language and meaning are denied.
10

11 33. The allegations in paragraph 33 are legal conclusions which require no response. To the
12 extent a response is required, Defendants deny the allegations in paragraph 33.
13

14 **PRAYER FOR RELIEF**

15 The remainder of the Complaint constitutes Plaintiff's request for relief which requires
16 no response. To the extent a response is required, Defendants deny that Plaintiffs are entitled to
17 the relief requested or any relief whatsoever.
18

19 **GENERAL DENIAL**

20 Defendants deny any allegations of the Complaint, whether express or implied, that are
21 not otherwise specifically admitted, denied, or qualified herein.

22 Dated: February 25, 2008

23 Respectfully submitted,

24 KAREN P. HEWITT
25 United States Attorney
26 THOMAS STAHL
27 Assistant U.S. Attorney
28 California State Bar No. 078291
United States Attorney's Office
Federal Office Building
880 Front Street, Room 6293

San Diego, CA 92101-8893
Email: thomas.stahl@usdoj.gov
Telephone: (619) 557-7140
Facsimile: (619) 557-5004

RONALD J. TENPAS
Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division
JEAN E. WILLIAMS, Chief
SETH M. BARSKY, Assistant Chief

/s/ Meredith L. Flax
MEREDITH L. FLAX, Trial Attorney
District of Columbia Bar No. 468016
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Benjamin Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
Telephone: (202) 305-0404
Facsimile: (202) 305-0275
Meredith.Flax@usdoj.gov

Attorneys for Defendants

OF COUNSEL:

Cheryll F. Dobson
Office of the Solicitor
U.S. Department of the Interior
Pacific Southwest Regional Office
2800 Cottage Way, Room E-1712
Sacramento, CA 95825-1890

IN THE UNITED STATES DISTRICT COURT
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CENTER FOR BIOLOGICAL DIVERSITY

Plaintiff,

vs.

KEMPTHORNE, et al.,

Defendants.

Case No. 07-2380-JM-AJB

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Meredith L. Flax, am a citizen of the United States and am at least eighteen years of age. My business address is 601 D Street, N.W., Room 3908, Washington, D.C. 20004.

I am not a party to the above-entitled action. I have caused service of Federal Defendants' Answer to Plaintiff's Complaint for Declaratory and Injunctive Relief on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

1. Lisa Belenky, Attorney for Plaintiff

I have caused service by first class U.S. mail on the following parties:

1. John Buse, Attorney for Plaintiff

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 25, 2008.

s/ Meredith L. Flax

MEREDITH L. FLAX

Email: meredith.flax@usdoj.gov